

## Cozen Currents: Can the Ungovernable Govern?

### The Cozen Lens

- House Speaker Mike Johnson (R-LA) is out to prove that his ungovernable caucus is capable of governing.
- Federal Trade Commission Chair Lina Khan and Assistant Attorney General for Antitrust Jonathan Kanter had a rough 2023, but with some momentum to start 2024, they are likely to continue with their progressive approach to antitrust.
- Despite the recent approval of Bitcoin ETFs, the crypto industry will continue to face skeptical Biden administration regulators in 2024.



Howard Schweitzer

CEO, Cozen  
O'Connor  
Public  
Strategies

hschweitzer@cozen.com  
Phone: (202) 912-4855  
Fax: (202) 640-5932

### Related Practice Areas

- Government Relations - Cozen O'Connor Public Strategies

### Can Johnson Succeed Where McCarthy Failed?

**Personnel is Policy.** The differences in who wields the House speaker's gavel trickles down in terms of strategy, personality, and objectives.

- Former Speaker Kevin McCarthy (R-CA) had been in a House leadership position since 2009. This experience and longevity had its pros and cons. While McCarthy established himself within the House GOP's inner circle and was a prolific fundraiser, he had a lot of baggage to fuel personal animus.
- Current Speaker Mike Johnson (R-LA) is the most junior representative elevated to the role since 1883. He couldn't have expected himself to be in this role this quickly. Johnson's personality is more nondescript and legalistic (highlighting his background as a former constitutional lawyer), while McCarthy was free-dealing and embraced media attention. It's also important that Johnson's relationship with former President Trump is strong.
- For McCarthy, who knew he was disliked by some members of his party and barely became speaker in the first place, his overriding objective was surviving as speaker. This meant appeasing conservatives even if it meant forcing his frontline members in swing districts to take unpopular votes. Johnson, by contrast, is much more worried about losing a majority in 2024 than being voted out by his caucus and is seeking to protect his majority-makers where possible.

**Role of the House Freedom Caucus (HFC).** The HFC and other dissidents like Rep. Matt Gaetz (R-FL) still hold an effective sword of Damocles over Johnson but they're willing to give him at least a bit more room to maneuver than McCarthy.

- Fundamentally, Gaetz and the HFC are motivated more by what they're against than by what they're for — this makes it especially difficult to govern. They leveraged their power to reshape the rules and threaten McCarthy, who made concessions to obtain the gavel. Ultimately though, they shot the hostage, imploding their power over the then-speaker.
- So far, Johnson has done his best to convince would-be dissidents that their disagreements are procedural rather than personal. Keeping trust in the individual (though maybe not in everything they do) is crucial to retaining the speakership. Johnson makes the case that he's doing the best he can, that he's balancing all corners of his caucus, and that the FY24 spending deal he reached with Democrats was the best they were going to get.
- This probably means Johnson getting more involved in the supplemental defense package to Israel, Ukraine, and Taiwan. The HFC seems unwilling to accept less strong border restrictions than are contained in H.R. 2, the partisan bill they passed out of the House, and it is unclear how much Johnson can deviate from it to strike a deal.

**What It Means to Govern.** Johnson's theory for retaining his majority in 2024 is to look as little like the House of 2023 as possible.

- The House of Representatives was (in)famously dysfunctional last year, between a protracted speakership confirmation, the motion to vacate, and high levels of unproductivity even by modern standards of divided government. Rarely do matters of House procedure escape the Beltway and rise to national prominence in the headlines of newspapers and on late-night TV monologues. Johnson realizes that this public perception strongly hurts his party's chances of retaining control of the chamber in November's elections and aims to keep the body as drama-free as possible.
- The good news for Johnson is that the former speaker set an exceptionally low bar to clear for relative competence and that once the FY24 spending bills become law, there are not many other items that are considered "must pass" before Election Day.
- This low-risk strategy also governs the scope of what Congress can get done. Just because FY24 spending is likely to be resolved it does not mean bipartisan dealmaking will be breaking out in the halls of Congress. Big-ticket but optional items like a narrow tax deal that has recently garnered momentum are an unnecessary complication.

#### Is 2024 the Year Khan and Kanter Strike Back?

**Down But Not Out.** Antitrust regulators had a difficult 2023, suffering several high-profile defeats, but are unlikely to deviate significantly from their past approaches in 2024.

- One difference between Federal Trade Commission (FTC) Chair Lina Khan and Assistant Attorney General for Antitrust Jonathan Kanter and their predecessors is their risk tolerance for defeats in court. For Khan and Kanter, these losses are part of the process and necessary for the transformative change they are trying to effectuate on antitrust enforcement over the long term.
- The merger guidelines jointly published by the FTC and Department of Justice (DOJ) at the end of 2023 give little indication that the regulators will change course.
- For as rough as 2023 was, there is some wind in the regulators' sails as they enter 2024. The agencies have won a handful of antitrust decisions in the last couple of weeks, providing momentum that Khan and Kanter will hope to carry through the year.

**Going Out with a Bang.** Given that this is potentially Khan and Kanter's final year in office, the two may try to swing for the fences and leave a lasting impact.

- One avenue may be filing more cases focused on competition issues. This could include lawsuits challenging private equity acquisitions or so-called "killer acquisitions" whereby corporate giants seek to gobble up nascent would-be competitors.
- This approach could also include more challenges for America's largest businesses. The regulators have several cases pending against today's tech giants, and there is reporting that indicates the DOJ may file a lawsuit against Apple this year.

**Round Two?** If President Biden wins reelection in November, despite some thinking that Biden may replace them, there is strong reason to believe that both Khan and Kanter may stay on for a second term.

- For Biden, keeping Khan and Kanter is one way to please progressives who have been frustrated with other policies his administration has pursued. In addition, he has taken little issue with their policies and often provided political cover for some of their most aggressive initiatives.
- If Khan or Kanter were to leave, it would likely be a voluntary decision. Khan is especially likely to stay on, given she is relatively young and there is no obvious higher office for her to pursue the change she wants.

**Gensler's Reluctant Bitcoin ETF Approval.** The Securities and Exchange Commission (SEC) approved 11 applications to launch Bitcoin ETFs last week, ending a multi-year stretch of denials spanning two presidential administrations.

- Well-known asset managers including Blackrock, WisdomTree, and Invesco were among the companies that received the green light from the SEC, easing the ability of retail investors to access crypto through familiar financial products.
- Crypto industry leaders are speculating the ETF approval and subsequent increase in retail investment in crypto markets could lead the SEC to moderate its enforcement-heavy approach to the sector. But SEC Chair Gary Gensler made clear in a [statement](#) released alongside the approval this will not be the case.
- Gensler and the SEC are instead focused on enforcement and the agency's legal battles with major crypto exchanges Coinbase, Binance, and Kraken. The SEC sued each last year for failing to register with the agency. Those cases are expected to take years to play out, giving Gensler plenty of time to continue his preferred regulation-by-enforcement approach to crypto.

**Regulatory Headwinds.** Although Gensler remains skeptical of providing further regulatory clarity for crypto, the SEC and other financial regulators will propose regulations this year that will impact the sector.

- The SEC is planning to finalize two proposed rules with implications for crypto by this April: an update of the agency's definition of an "exchange" and an overhaul of its rules for safeguarding client assets. An update to the definition of an "exchange" could codify the SEC's requirement that crypto exchanges need to register with the agency, something many have suggested is made impossible by contradictory and confusing demands. The safeguarding proposal would include digital assets in the definition of client assets which SEC-registered advisors must custody with a qualified custodian. There are limited qualified custodians for digital assets.
- Similar to the SEC, the Commodity Futures Trading Commission (CFTC) brought 47 enforcement actions involving digital asset misconduct in the last fiscal year and plans to continue to root out bad actors within its jurisdiction in 2024. But CFTC Chair Rostin Behnam has expressed greater interest in developing regulatory clarity for the industry, and [approved](#) Chicago-based crypto derivative exchange Bitnomial's application to become a registered clearinghouse last month. Behnam [indicated](#) the CFTC will consider regulations around applications for vertical integration of derivative exchanges later this year.
- The Treasury Department could also issue a rule to tax the brokers of digital asset transactions in 2024. The rules would require individuals facilitating transactions of digital assets to report the gross proceeds of the transactions to the Internal Revenue Service. The agency has yet to give a date to release its final rule, but the law requires reporting to begin in January 2026 for sales occurring on or after January 1, 2025.

**Legislation Takes One Step Forward, Two Steps Backward in 2024.** Legislation establishing clear guardrails and regulatory oversight of the crypto industry is poised to advance out of the House in 2024, but its path to becoming law remains uncertain.

- Retiring House Financial Services Committee (HFSC) Chair Patrick McHenry (R-NC) is [working](#) with House GOP leadership to schedule floor votes on his [Clarity for Payment Stablecoins Act](#) and the [Financial Innovation and Technology for the 21st Century Act](#). These bills would establish a regulatory framework for stablecoins and define cryptocurrencies as commodities or securities.
  - Both bills are expected to pass the House with bipartisan support this summer, although the degree of Democratic support will be determined by ongoing negotiations between McHenry and HFSC Ranking Member Maxine Waters (D-CA).
  - Crypto legislation faces a much more uncertain future in the Senate, where Senate Banking Committee Chair Sherrod Brown (D-OH) remains skeptical of the need for new regulations. Brown is [critical](#) of McHenry's bills, believing they cater to industry, and has expressed no interest in advancing industry-friendly legislation as he faces a tough re-election fight.
-